

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
NOV 25 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Part 95 of the)
Commission's Rules to Provide)
Regulatory Flexibility in the)
218-219 MHz Service)
)

WT Docket No. 98-169
RM-8951

ORIGINAL

To: The Commission

REPLY COMMENTS OF DISPATCH INTERACTIVE TELEVISION, INC.

Dispatch Interactive Television, Inc. ("DITV"), a licensee in the 218-219 MHz Service (the "Service") in the Indianapolis, Indiana and Columbus, Ohio Metropolitan Statistical Areas, hereby submits its reply comments in response to the comments filed on the Notice of Proposed Rulemaking ("NPRM") issued in the above-referenced proceeding.¹

In its comments filed on October 30, 1998, DITV supported the Commission's conclusion that providing additional flexibility for the initiation of new and innovative services in

¹ DITV is a wholly-owned subsidiary of the Dispatch Printing Company ("Dispatch"). Dispatch also owns, through subsidiaries, WTHR(TV), Channel 13, Indianapolis, Indiana and WBNS-TV, Channel 10, Columbus, Ohio.

response to technological developments and marketplace demands will serve the public interest. DITV specifically supported the Commission's proposal to permit licensees to have the flexibility to offer services either as common carriers or private carriers under the FCC's Commercial Mobile Radio Service ("CMRS") or Private Mobile Radio Service ("PMRS") rules. DITV agreed with the Commission that this flexibility, which is consistent with the Commission's recent actions authorizing several other services, is the best approach to ensuring that the spectrum allocation is put to its highest and best use.² In particular, the Commission's decision to permit licensees to interconnect with the Public Switched Network ("PSN") and to other CMRS providers, subject to compliance with the regulatory restrictions applicable to the services offered, will ensure that all licensees for the Service have the flexibility to respond to marketplace demands.

² See DITV Comments at 3-4; Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), 12 FCC Rcd. 10785, 10798 (1997) ("a flexible use allocation serves the public interest. Permitting a broad range of services to be provided on this spectrum will permit the development and deployment of new telecommunications services and products to the consumers."); Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 11 FCC Rcd. 624, 631 (1995) (flexibility will permit licensees to adapt to changing circumstances "without the need for Commission intervention, further contributing to their efficient use").

Approximately fifteen parties filed comments on the NPRM. Numerous parties, including Service providers and equipment vendors, supported the Commission's proposal to provide flexibility in service offerings, including the FCC's proposal to allow Service providers to offer common carrier or private carrier service under the CMRS or PMRS rules and to interconnect with the PSN and other CMRS providers.³ In fact, only one party opposed the Commission's proposal to provide regulatory flexibility to Service providers: AirTouch Paging ("AirTouch"), a provider of one-way messaging service and narrowband Personal Communications Service ("PCS") in markets where the Service is also licensed. AirTouch opposed the Commission's proposed rule changes based on the premise that the proposed flexibility (1) will stifle the development of interactive video delivery service ("IVDS") as it was originally conceived, (2) will undermine the FCC's auction process, and (3) impermissibly will shift the FCC's regulatory policy with regard to the Service. None of these three assertions by AirTouch provide any basis for revising the approach proposed by the Commission in its NPRM.

³ See, e.g., Comments of The 218-219 MHz Licensees ("Licensees") at 2-3; Community Teleplay, Inc. ("CTI"), at 18; Radio Telecom & Technology, Inc. ("RTT"), at 2-3; In-Sync Interactive Corporation ("In-Sync") at 3-5; The Bay Area 218-219 MHz Group at 2; Kingdon R. Hughes at 3-4.

First, AirTouch erroneously asserts that the proposed rule change providing flexibility in service offerings will be responsible for stifling the provision of IVDS services.⁴ As DITV and other parties noted in their Comments, the Commission's proposal is correctly based upon its recent approach in other contexts that provides for flexibility in using spectrum to offer service.⁵ The Service, as currently authorized, already permits certain types of service applications that are consistent with CMRS and PMRS regulation.⁶ Under the current proposal in the NPRM, applicants will be governed by appropriate regulatory rules (CMRS or PMRS) based upon the services they actually provide to the public. Service providers also will be able to offer services, including those using the PSN, that are warranted by demand from the public.⁷

⁴ AirTouch at 4.

⁵ See DITV at 3-4; In-Sync at 4; Licensees at 3.

⁶ Currently, licensees can provide "point-to-multipoint, multipoint-to-point, short distance communications service ... to provide information, products, or services to, and allow interactive responses from, subscribers in the licensee's service area." 47 C.F.R. § 95.803. These communications can include voice and data communications, whether fixed or mobile. Id. § 95.805.

⁷ Thus, the decision to offer traditional video IVDS programming will be governed by market forces, and not six-year old rulemakings or the desires of potential competing service providers, like AirTouch. As the Comments of CTI and RTT indicate, licensees may provide service currently envisioned by the FCC's Service rules. The action proposed by the Commission will permit licensees the flexibility to respond to demand for
(continued...)

Second, AirTouch erroneously seeks to prevent the Commission from adopting its proposed rule changes for the Service based on an allegation that these changes will undermine the Commission's auction process.⁸ In fact, AirTouch simply complains that licensees for the Service paid, on average, "\$0.85 per MHz/pop," while "narrowband PCS spectrum sold on average for \$3.10 per MHz per person in the service territory."⁹ Commission decisions about the provision of service, however, cannot be based upon one licensee's complaint that it should have paid less for spectrum, or that other licensees should have paid more for their spectrum.¹⁰ Instead, as the Commission recognized in its NPRM, the expansion of services and the adoption of rules providing for flexibility in service offerings should be based on the public interest and the best use of the spectrum at issue.¹¹

⁷ (...continued)
service from the public that has not been met.

⁸ AirTouch at 5-6.

⁹ Id. at 5.

¹⁰ Indeed, a comparison of the price paid by IVDS auction bidders, when compared with prices paid by bidders in other spectrum auctions, including the D,E & F block broadband PCS auction, might support the Commission's proposed action in the NPRM, if such a comparison were relevant.

¹¹ Given the expense of funds at auction and on the provision of service by licensees like DITV, see DITV at 2-3, and the passage of several years in the effort to provide "traditional" IVDS service, it can not be argued that DITV and other auction purchasers "gamed" the auction process by purchasing their IVDS spectrum cheaply with the intention of converting it to a more
(continued...)

Finally, AirTouch erroneously asserts that, in making the proposed changes to its rules, the Commission would impermissibly be departing from its past decisions with regard to the development of IVDS Service.¹² As an initial matter, without citation, AirTouch relies on a policy of administrative law that generally restricts Commission actions in adjudications, where the FCC cannot depart from established agency policy absent reasoned analysis and explanation.¹³ In this rulemaking proceeding, the FCC need only provide a reasonable, non-arbitrary basis for the adoption of its new rules. As DITV and other commenting parties have indicated, in the NPRM, the Commission provided such a sound rationale for its decision to provide for flexibility in Service offerings by licensees.¹⁴

Conclusion. DITV applauds the Commission for its proposals to allow licensees in the Service to respond to technical and marketplace changes. As a licensee long committed to developing a viable service in this band, DITV submits that these proposed changes will serve the public interest by ensuring

¹¹ (...continued)
desirable use.

¹² See AirTouch at 7.

¹³ See WLOS-TV, Inc. v. FCC, 932 F.2d 993, 995 (D.C. Cir. 1991).

¹⁴ See supra at 2-3 & n.2.

that the spectrum is used efficiently and that the Service is provided to the largest feasible number of users.

Respectfully submitted,

DISPATCH INTERACTIVE TELEVISION, INC.

By: Mark D. Schneider / sp
Mark D. Schneider
Thomas P. Van Wazer

Sidley & Austin
1722 Eye Street, NW
Washington, D.C. 20006
202-736-8000

Its Attorneys

Date: November 25, 1998